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No. _____

In The

# Supreme Court of the United States

October Term, 1991

CITY OF OKLAHOMA CITY,

*Cross-Petitioner*,

v.

RAYMON J. MELTON,

*Respondent.*

**Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## CROSS-PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is the judgment of the Tenth Circuit Court of Appeals affirming the jury's verdict as to respondent's First Amendment claim pursuant to 42 U.S.C. § 1983 in direct conflict with prior decisional law of this Court and other circuits on this federal question?

2. Was the covert taping of a confidential interview with a federal prosecutor and the turning over of that tape to defense counsel by respondent, a police officer, protected speech on a matter of public concern, or simply conduct not protected under the First Amendment?

3. Assuming *arguendo*, the conduct of Melton as described in Question 2 is speech on a matter of public concern, did the Tenth Circuit err in determining Melton's interest in that speech outweighed The City's interest in the efficient operations of its police department?

4. Did the Tenth Circuit Court of Appeals commit error when it determined as a matter of law the cross-petitioner had the burden of proof to show evidence of actual disruption of intra-departmental activities before the First Amendment balancing test could tip in favor of the governmental entity?

5. Does respondent have a property interest in his status as a retired police officer pursuant to Okla. Stat. tit. 11, § 50-125 (1981)?

## QUESTIONS PRESENTED – Continued

6. [Reserved question if this Court grants petition for writ of certiorari] Does respondent have a property interest in continued employment?

## PARTIES

The participants in the proceedings below were:

Raymon J. Melton, Plaintiff

City of Oklahoma City,[1] a municipal corporation; Lloyd A. Gramling, Chief of Police for The City of Oklahoma City; Gerald L. Emmett,[2] Assistant Chief of Police for The City of Oklahoma City; Marvin Maxwell, Major, Oklahoma City Police Department; William R. Chambless, Major, Oklahoma City Police Department; Carl Smith,[3] Lieutenant, Oklahoma City Police Department; David McBride,[4] Lieutenant, Oklahoma City Police Department; and Paula Hearn, Assistant to The City Manager, Defendant.

Oklahoma Municipal League, Inc. *amicus curiae*, on brief to the Tenth Circuit en banc (no subsidiaries or parent companies known)

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[1] The City of Oklahoma City is a municipal corporation with no parent companies or subsidiaries to list pursuant to Rule 29.1. This petition for writ of certiorari pertains to judgment rendered against it. Except as noted herein, the remaining defendants have filed separate cross-petitions.

[2] Deceased.

[3] Carl Smith received a defendant's verdict which was affirmed. The opinion rendered in favor of Melton in Appendix of petitioner, pp. 53-136, is not the subject of error by Melton in his petition.

[4] The plaintiff's judgment against David McBride was reversed by the Tenth Circuit in the opinion reported in *Melton I*, petitioner's Appendix at 53, and is not the subject of error by Melton in his petition. McBride received a defendant's verdict on the First Amendment and Property Interest Due Process claims.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

PARTIES ..... iii

TABLE OF CONTENTS ..... iv

TABLE OF AUTHORITIES ..... vi

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

STATUTES INVOLVED ..... 3

STATEMENT OF THE CASE ..... 5

A. Factual Background ..... 5

B. Proceedings Below ..... 8

REASONS FOR GRANTING THE WRIT ..... 11

I. THE TENTH CIRCUIT COURT OF APPEALS RENDERED A DECISION ON A FEDERAL QUESTION ON THE FIRST AMENDMENT AND PUBLIC EMPLOYEE SPEECH WHICH WAS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT ..... 11

II. THE TENTH CIRCUIT COURT OF APPEALS DECIDED A FEDERAL QUESTION ON BURDEN OF PROOF IN FIRST AMENDMENT PUBLIC EMPLOYEE SPEECH WHICH WAS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ..... 23

TABLE OF CONTENTS – Continued

Page

III. TENTH CIRCUIT'S DECISION IN DETERMINING MELTON HAD A SEPARATE PROPERTY INTEREST AS A RETIRED POLICE OFFICER PURSUANT TO OKLA. STAT. TIT. 11, § 50-125 WAS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT ..... 24

IV. THE TENTH CIRCUIT'S FINDING THAT MELTON HAD A PROPERTY INTEREST IN CONTINUED EMPLOYMENT WAS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT ..... 30

CONCLUSION ..... 30

# TABLE OF AUTHORITIES

Page

CASES

*Bishop v. Wood*, 426 U.S. 341 (1976) ..... 28

*Board of Regents v. Roth*, 408 U.S. 564 (1972) .....28, 29

*Brady v. Maryland*, 373 U.S. 83 (1963) ..... 6

*Broadrick v. Oklahoma*, 413 U.S. 601 (1973) ..... 15

*Brown v. Glines*, 444 U.S. 348 (1980) ..... 15

*City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) .26, 28

*Civil Service Commission v. Letter Carriers*, 413 U.S. 548 (1973) ..... 15

*Connick v. Myers*, 461 U.S. 138 (1983) ..... 11, 18, 20, 21

*Graham v. The City of Oklahoma City*, 859 F.2d 142 (10th Cir. 1988) .....28, 29

*Harlow v. Fitzgerald*, 457 U.S. 800 (1982) ..... 12

*Jurgensen v. Fairfax County*, 745 F.2d 868 (4th Cir. 1984) ..... 16, 22, 23

*Kelley v. Johnson*, 425 U.S. 238 (1976) ..... 15

*Keyishian v. Board of Regents*, 385 U.S. 589 (1967) .... 15

*Mason v. National Flood Insurers Association*, 431 F. Supp. 1021 (N.D. Okla. 1977) ..... 27

*Matherne v. Wilson*, 851 F.2d 752 (5th Cir. 1988) ..... 23

*McAuliffe v. Mayor of City of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892) ..... 15

TABLE OF AUTHORITIES

Page

*Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) ..... 12, 17

*Pickering v. Board of Education*, 391 U.S. 563 (1968) ..... 12, 17, 19

*Rankin v. McPherson*, 483 U.S. 378 (1987) ..... 20, 21, 23

*United States v. Page*, No. CR-83-73-R (W.D. Okla. filed April 6, 1983), *aff'd*, 808 F.2d 723 (10th Cir. 1987), *cert. denied*, 482 U.S. 918 (1987) ..... 6

*Zant v. Stephens*, 462 U.S. 862 (1983) ..... 29

STATUTES

18 U.S.C. §§ 1961-68 ..... 8

28 U.S.C. § 1254(1) ..... 2

28 U.S.C. § 2101(c) ..... 2

42 U.S.C. § 1983 ..... 4, 8, 19

42 U.S.C. § 1985 ..... 8

42 U.S.C. § 1988 ..... 8

Okla. Stat. tit. 11, § 13-108 (West 1978) ..... 4, 30

Okla. Stat. tit. 11, § 50-125 (Supp. 1991) ..... 4, 24, 25, 27, 29

CONSTITUTION

First Amendment ..... *passim*

Fourteenth Amendment, Section 1 ..... 3, 18, 28, 30

## TABLE OF AUTHORITIES

Page

MISCELLANEOUS

Rule 12.3 of the Rules of the Supreme Court.....1, 2

Rule 13.4 of the Rules of the Supreme Court.....1, 3

Rule 13.5 of the Rules of the Supreme Court.....1, 2

Rule 15 of the Rules of the Supreme Court ..... 3

§ 1.01 of The Oklahoma City Police Code of Ethics
..... 6, 7, 14

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CITY OF OKLAHOMA CITY, et al.,

*Cross-Petitioners,*

v.

RAYMON J. MELTON,

*Respondent.*

**Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioner, The City of Oklahoma City, respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Tenth Circuit entered in this proceeding March 19, 1991, as authorized by Rules 12.3, 13.4 and 13.5 of the Supreme Court Rules, 1990 revisions.

## OPINIONS BELOW

On June 21, 1989, the Court of Appeals for the Tenth Circuit rendered its opinion on the consolidated appeals and cross-appeal from the United States District Court in the Western District of Oklahoma, which affirmed in part

and reversed in part the judgment of the district court on a jury verdict. The cross-petitioners filed separate petitions for rehearing with suggestion for en banc consideration. The June 21st opinion is reported at 879 F.2d 706 and is included in the Petitioner's Appendix at 53-136.

On November 3, 1989, the panel members of the Tenth Circuit Court denied the petitions, but a majority of the Court's active judges agreed to rehear the cases on four issues reported at 888 F.2d 724, and attached to the Petitioner's Appendix at 50-52. On March 19, 1991, an opinion en banc was filed and reported at 928 F.2d 920, and included in Petitioner's Appendix at 1-49. Judgment was entered the same day which vacated the portion of the judgment of the district court in favor of Melton and remanded the matter to the district court to conduct other proceedings in accordance with the Tenth Circuit's opinion of June 21, 1989.

## JURISDICTION

On June 13, 1991, respondent filed a motion for extension of time to file, a petition for writ of certiorari, from the judgment of the Court of Appeals for the Tenth Circuit en banc filed March 19, 1991. This was pursuant to Rule 13.5 of the Rules of the Supreme Court. This Court granted an extension until July 2, 1991, and at that time a petition for writ of certiorari was filed. The petition was received by The City of Oklahoma City on July 5, 1991.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c) and Rule 12.3 of the Rules of the Supreme Court, and the cross-petition is filed

within thirty days of the receipt of the petition for writ of certiorari.[5]

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment to the Constitution of the United States provides:

> **AMENDMENT I – FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES**
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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[5] This cross-petitioner has objected to the jurisdiction of the court to review a petition for writ of certiorari as required by Rules 13.4 and 15 of the Rules of the Supreme Court.

3. **42 U.S.C. § 1983 provides:**

> **§ 1983. Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. **Okla. Stat. tit. 11, § 50-125 (West Supp. 1991) provides:**

> **§ 50-125. Retired officers – Retention of status as peace officers – Emergencies**
>
> Members retired under the provisions of this article may retain their status as peace officers of the State of Oklahoma, retired, and as such may retain the right to keep and bear firearms when approved by the officials of the municipality of retirement. Such retired members may in times of great emergency or danger serve in keeping with their availability and ability at the request of the Governor of Oklahoma or the mayor of their retirement municipality.

5. **Okla. Stat. tit. 11, § 13-108 (West 1978) provides:**

> **§ 13-108. Deposit of copies for record – Judicial notice**
>
> After the approval of the charter by the Governor, duplicate copies shall be made

> and one shall be deposited in the office of the Secretary of State, and the other, after being recorded in the office of the county clerk of the county in which the situs of the municipality is located, shall be deposited in the archives of the municipality. Thereafter the charter shall be judicially noticed in all court proceedings.

## STATEMENT OF THE CASE

Plaintiff/Cross-Appellee/Petitioner/Respondent, Melton, will hereinafter be referred to by name or Respondent; Defendant, The City of Oklahoma City, and other party Defendants/Appellants/Cross-Petitioners will be referred to as "The City" or names of Defendants, respectively, or Cross-Petitioners, collectively.

### A. Factual Background

Lt. Melton, a detective for The Oklahoma City Police Department, was a friend of William C. Page, a state district court judge in Oklahoma County, Oklahoma. Judge Page was being investigated and prosecuted by the United States Attorney for the Western District of Oklahoma on charges of racketeering charges as a public official.

Prior to Page's trial, Melton went to the federal courthouse for an interview about Judge Page with The Assistant United States Attorney handling the case. This interview took place while Melton was acting in the course of his duties as a police officer.

While this confidential interview was being conducted by a federal prosecutor, Melton was surreptitiously taping the conversation. Plaintiff later turned this taped interview over to defense counsel for Judge Page and also discussed the contents of the confidential interview with said counsel. Melton later testified for the defense in the criminal prosecution of Judge Page. Although Melton testified that he believed this taped conversation included *Brady* or exculpatory material, the trial court in the criminal action determined that it did not. The district court judge in the civil case instructed the jury that it was *Brady* material. The federal district judge denied Mr. Page's motion to dismiss the criminal charges based upon the failure of the government to provide exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963).[6]

Federal Bureau of Investigation Special Agent Ron West lodged a complaint with The City's Police Chief, Lloyd A. Gramling.

As a result of this FBI complaint, Lt. Carl Smith of the police department conducted an internal affairs investigation of Melton at the request of Chief Gramling.

Lieutenant Smith then provided Melton with a written notice informing Melton that an investigation of the FBI charges was being conducted. Melton was specifically accused of violating § 1.01 of The Oklahoma City Police

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[6] Page was convicted of racketeering and extortion on July 29, 1983. *United States v. Page*, No. CR-83-73-R (W.D. Okla. filed April 6, 1983), *aff'd*, 808 F.2d 723 (10th Cir. 1987), *cert. denied*, 482 U.S. 918 (1987).

Code of Ethics by revealing details of a confidential conversation with an Assistant United States Attorney to defense counsel for Page and by making perjured statements in an affidavit and during his testimony given in the criminal trial. On September 8, 1983, Gerald L. Emmett, Assistant Chief of Police, gave notice to Melton that the Review Board would convene on September 13, 1983, as a result of the internal affairs investigation.

The Departmental Review Board convened on the scheduled date and Melton was advised by Chairman Emmett's opening remarks that the allegations of federal perjury were dropped and the Board would only deal with the alleged breach of the Code of Ethics.

The pertinent portion of § 1.01 provides:

> I will be exemplary in obeying the laws of the land and the regulations of my Department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

Lt. Melton appeared before the Board and freely admitted to the members that he had secretly taped his interview with the federal prosecutor and turned the recorded tape over to Page's legal counsel.

The Board members voted six to one to sustain the charge that Melton had committed a serious violation of the Code of Ethics by his conduct in secretly taping a confidential interview with an Assistant U.S. Attorney and by turning this tape over to the criminal defense counsel. There was never any consideration by the Board that The Code of Ethics was violated by virtue of Melton's appearance as a witness at the criminal trial.

The findings of the Board were submitted to Police Chief Gramling, who subsequently terminated Melton by letter written September 13, 1983, after the disciplinary dismissal was approved by The City Manager. Subsequent to his termination, Melton was granted retirement pension benefits under the State Police Pension System due to the length of his service with the police department without objection of The City.

Chief Gramling, by letter written to respondent after his dismissal, advised Melton that due to the unmeritorious retirement, he did not "retain the privilege or approval to bear firearms or otherwise represent yourself as a commissioned officer of The Oklahoma City Police Department, as provided by State Law 11 O.S. 50-125".

With respect to other factual background information surrounding this case, cross-petitioner would adopt the statement of facts contained in its brief in opposition to a petition for writ of certiorari and the statement of the case of the other cross-petitioners.

**B. Proceedings Below**

Plaintiff sued The City of Oklahoma City, the police chief, and seven employees of The City under 42 U.S.C. §§ 1983, 1985 and 1988, and 18 U.S.C. §§ 1961-68 alleging he was wrongfully terminated as a police officer and was deprived of his liberty and property rights without due process of law and engaging in a criminal conspiracy, and that his discharge was a retaliation for the exercise of his First Amendment Rights.

On February 4, 1985, a jury verdict was rendered against some of the defendants in a total amount of $1,272,000 in actual damages and a total of $28,200 in punitive damages. The trial court directed a verdict as to all cross-petitioners on Melton's RICO claim. A verdict on the § 1985(2) claims was rendered in favor of all the defendants. Carl Smith received a defendant's verdict. Additionally, David McBride received a defendant's verdict on the First Amendment claim and the Due Process claim – property interest. The punitive damages were stricken when the trial court partially granted cross-petitioners' J.N.O.V. Motion.

The cross-petitioners filed a motion for new trial which was denied. The City of Oklahoma City and the individual cross-petitioners appealed the judgment of the trial court for the Western District of Oklahoma, including the denial of attorney fees to Smith. The appeals were consolidated. Melton cross-appealed on the issues of the cross-petitioners' verdict on the RICO charges and the J.N.O.V. striking punitive damages.

On June 21, 1989, the panel of the Tenth Circuit Court of Appeals rendered an opinion on this consolidated appeal. In its opinion, the Court:

(1) Reversed the jury verdict on the First Amendment claim and remanded for a new trial as to the individual cross-petitioners on the issue of whether Lt. Melton's trial testimony was a substantial motivating factor in his discharge (As to The City, the Court affirmed the jury verdict of $50,000.);

(2) With respect to cross-petitioners' liability on Lt. Melton's deprivation of property claims on continued employment, ordered the trial court to direct a verdict for the

individual defendants. (In this case, the appellate court appeared to direct judgment for respondent and against Gramling solely on the retirement status property interest claim. Additionally, the matter was remanded to the trial court to determine if The City had ratified Gramling's acts and/or whether or not Gramling was acting in his official capacity.);

(3) With respect to the liberty interest claims, reversed the verdict against McBride;

(4) Affirmed the judgment on the cross-appeals;

(5) Affirmed the J.N.O.V. as to the punitive damage issue;

(6) Affirmed the denial of Smith's request for attorneys' fees.

On March 19, 1991, the opinion on the rehearing en banc and judgment were rendered the same day. The en banc court:

(1) Affirmed the judgment of the district court in part and reversed in part;

(2) Vacated all the judgments as to the liberty interest claims against the remaining cross-petitioners, including The City, and remanded to the district court with orders to enter judgment for these cross-petitioners on this claim;

(3) Further ordered the trial court to conduct other proceedings in accordance with the Tenth Circuit's opinion of June 21, 1989.

The jurisdictional statement details the proceedings occurring since the judgment of March 19, 1991, was entered.

## REASONS FOR GRANTING THE WRIT

### I.

### THE TENTH CIRCUIT COURT OF APPEALS RENDERED A DECISION ON A FEDERAL QUESTION ON THE FIRST AMENDMENT AND PUBLIC EMPLOYEE SPEECH WHICH WAS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT.

Melton's conduct in covertly taping a confidential interview with a federal prosecutor is not protected speech and such a finding by the Tenth Circuit conflicts with prior decisional law of this Court. In the first opinion, the Tenth Circuit Court of Appeals reviewed Instruction No. 5, the trial court's instruction as to Melton's allegations he was discharged on the basis that he exercised his First Amendment rights and held it improperly combined two bases of liability and did not include the proper burden of proof allocation. The court held these errors to be harmless as to Defendant City. Petitioner's Appendix at 112-13. The two bases for liability were:

(1) Lt. Melton's trial testimony in the Page criminal trial;

(2) Melton's actions in connection with the covert tape recording of the prosecutor's conversation.

The Tenth Circuit also noted the trial court erred in submitting the First Amendment issue to the jury as to whether or not Plaintiff's conduct was constitutionally protected, as the inquiry into the "protected status of speech is one of law, not fact". *Id.* at 113. *See Connick v. Myers*, 461 U.S. 138, 148 (1983).

The appellate court further noted that although the defendants contended throughout the trial proceedings

that no evidence was introduced to show Melton was terminated for his trial testimony, the matter would be remanded to the trial court in a jury trial to determine if the criminal trial testimony was the motivating factor in plaintiff's discharge in accordance with *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), as to the individual defendants. Petitioner's Appendix at 114. The Tenth Circuit further determined the individual defendants were entitled to a qualified immunity defense on Melton's conduct as to the tape recording under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), Petitioner's Appendix at 114.

Since The City, a municipal corporation, was not entitled to qualified immunity, the Court affirmed the verdict of the trial court stating that The City would be liable under either ground since both grounds were protected speech. Petitioner's Appendix at 72.

In affirming the judgment against this cross-petitioner on the First Amendment claim, the Tenth Circuit conducted a multi-step inquiry. First, the Court applied the *Connick* test and determined Melton's conduct was a matter of public concern. The second prong of the inquiry was to conduct a "balancing test" of the interests of a public employee versus the interests of the governmental employer "in the effective and efficient fulfillment of its responsibilities to the public", Petitioner's Appendix at 62-68, citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

If the first two prongs weigh in favor of plaintiff, plaintiff bears the burden to prove the protected speech was the motivating factor in his termination. Petitioner's Appendix at 69, citing *Mt. Healthy*, 429 U.S. at 287. If the

plaintiff has met this then in the fourth prong of the test, the burden of proof is shifted to the public employer to prove the protected speech was not the motivating factor. The Tenth Circuit in *Melton* further noted the first two prongs of the inquiry were questions of law for the Court while the last two steps were questions of fact for a jury.

The Tenth Circuit applied this inquiry to both of Melton's allegations of protected speech and held both were protected. However, the Court held on the individuals' claim of qualified immunity that the taping was not a "clearly established" right.

The majority opinion concluded that respondent's disclosure of a private conversation with an Assistant United States Attorney to the counsel for Judge Page in the criminal proceeding was a matter of public concern and the balancing test weighed in favor of Melton.

The City contends that Melton's criminal trial testimony was the motivating factor in his termination and no evidence was submitted at trial which contradicts that contention. The City does not contest that testimony in a criminal trial is protected speech even for public employees, and this issue is not grounds for requesting a cross-petition for writ of certiorari.

Cross-petitioner does contend, however, that there are grounds for this Court to exercise its supervisory jurisdiction and grant this cross-petition based on a misapplication of the controlling United States Supreme Court decisions.

Specifically, the Tenth Circuit Court of Appeals did not properly analyze Melton's speech when it determined the conduct of plaintiff in taping a conversation with a

prosecutor while on duty as a police officer and turning over this recorded conversation to a criminal defense attorney was a matter of a public concern. The Tenth Circuit by dicta admitted that Melton's actions were for personal reasons.

> Melton, however, recorded the interview for a purely private purpose. As a friend of Page, Melton believed he (Melton) was under surveillance and did not want to risk being misquoted. (Record citations omitted. Judge Baldock concurred in part as to the First Amendment issue.)

Petitioner's Appendix at 121.

> In preparation for the trial of Mr. Page, the federal prosecutor interviewed Mr. Melton. For reasons of his own, Mr. Melton surreptitiously recorded his conversation with the prosecutor and later gave the recording to counsel for Mr. Page.

Petitioner's Appendix at 3.

Further, even if such conduct were a matter of public concern, the Tenth Circuit erred when it held the *Connick/Pickering* balancing test tipped in favor of Melton, a police detective who violated the police department's Code of Ethics, § 1.01, by divulging confidential matters which were secretly taped while in his course of duties as a police officer.

Historically, there was a right/privilege dichotomy which provided that a public employer could completely restrict an employee's free speech rights as a condition of employment since public employment was a privilege. First Amendment freedom of speech protection was subsequently afforded to citizens of the states by the

incorporation of the Due Process Clause of the Fourteenth Amendment. This view was expressed by Justice Holmes in *McAuliffe v. Mayor of City of New Bedford* when he announced: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of City of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892) and cited in dissent in *Rankin v. McPherson*, 483 U.S. 378, 395 (1987). In *McAuliffe*, a policeman was removed from office by the Mayor after it was determined the policeman had violated a regulation which provided: "No member of the department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever." *Id.* at 517. The allegation was that the police officer was not entitled to express his political opinions. Justice Holmes further noted in *McAuliffe*: "On the same principle, the city may impose any reasonable condition upon holding offices within its control." *Id.* at 518.

The cases upholding this right/privilege distinction were later limited as to the scope of conditions which could be placed on public employees. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). However, conditions on public employment have been upheld on the basis of the strong governmental interests involved. *Brown v. Glines*, 444 U.S. 348 (1980) (military personnel must yield to certain demands of discipline and duty); *Kelley v. Johnson*, 425 U.S. 238 (1976) (upholding a police department regulation governing hair grooming for police officers in a desire for an esprit de corps); *Civil Service Commission v. Letter Carriers*, 413 U.S. 548 (1973); and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding Hatch Act and similar state versions). In the case at bar, Melton was not discharged for the content contained in the secretly

recorded tape; he was discharged for secretly recording and turning over the tape. The ethical restrictions imposed on Melton's conduct were designed to facilitate cooperation and trust between police and other law enforcement personnel, such as prosecutors. Confidentiality is of paramount importance, and the various branches of law enforcement must be able to expect such discretion from each other in furtherance of their common goals. It was not what was said on Melton's tape that concerned The City, but rather the fact that he acted in a way which destroyed the necessary expectation of confidentiality.

In *Jurgensen v. Fairfax County*, 745 F.2d 868 (4th Cir. 1984), the United States Court of Appeals for the Fourth Circuit upheld the demotion of a police department employee who clandestinely took a copy of the department's Emergency Operations Center Internal Inspection Report to Bob Woodward of the *Washington Post* after Woodward had continued to inquire about the report on a number of occasions. Noting that "the free speech rights of an employee in a police department are more limited than of a teacher," *id.* at 880, the Court found Jurgensen's conduct in releasing the confidential materials, in violation of a departmental regulation governing his employment, was insubordination and his discharge was not a violation of Jurgensen's First Amendment rights. *Id.* at 887. In the present case, Melton's conduct was also in direct violation of a valid departmental regulation which governs conduct, not the content of speech.

The seminal case on the issue of the right of a governmental employer to place restrictions on a public employee's First Amendment freedom of speech is *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering*,

a public school teacher wrote a letter to the editor with criticisms against the school board and superintendent for their handling of a recent school tax election. In reversing the ruling of the Supreme Court of Illinois which had affirmed the teacher's dismissal, the United States Supreme Court stated:

> [T]he State has interests as an employer in regulating speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

*Id* at 568.

Subsequent cases expounded on this *Pickering* balancing test which was to be the touchstone to determine if a public employee's speech or activity qualified for constitutional protection. The burden of proof of the parties was established in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). In this case, Doyle, a public teacher, was not rehired after several incidents, including making obscene gestures to students when they failed to follow command in a cafeteria and after he conveyed by telephone conversation the substance of a memorandum concerning a dress code of the school to a local radio station. The Court upheld the finding of the district court that the telephone communication was protected speech but could not determine if this communication was the substantial cause of his termination.

The Court found:

> There is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public. We therefore accept the District Court's finding that the communication was protected by the First and Fourteenth Amendments.

*Id.* at 284.

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' – or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

*Id.* at 287.

The parameters of what is a matter of "public concern" was announced by this Court in *Connick v. Myers*, 461 U.S. 138 (1983). Myers, an Assistant District Attorney, was told she would be transferred to a different division of criminal court and she strongly opposed this transfer. She expressed her displeasure by circulating a questionnaire soliciting views of her fellow peers on many matters, including issues dealing with grievances, office transfer policy and political campaigns. The District Attorney discharged her because of her refusal to transfer and her distribution of the questionnaire which he determined was an act of insubordination. Myers instituted a

civil rights action pursuant to 42 U.S.C. Section 1983. The district court held that the questionnaire involved matters of public concern and was, therefore, protected speech. Additionally, the trial court determined that the District Attorney, the governmental entity, had not clearly demonstrated the questionnaire had substantially interfered with the operations of the office. The Court of Appeals affirmed.

On certiorari, this Court reversed the decision of the Court of Appeals for the Fifth Circuit and held the discharge of the Assistant District Attorney did not offend the First Amendment. The Supreme Court determined the district court erred by misapplying the *Pickering* test and "striking the balance" for Myers, the public employee. *Id.* at 142.

> The repeated emphasis in Pickering on the right of a public employee "as a citizen in commenting upon matters of public concern," was not accidental. This language, reiterated in all of Pickering's progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter.

*Id.* at 143 (footnote omitted).

> Pickering, its antecedents and its progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of

> the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

*Id.* at 146 (citations omitted).

The Supreme Court in *Connick* held the determination of whether a public employee's speech is a matter of public concern "must be determined by the content, form and context of a given statement, as revealed by the whole record". *Id.* at 147-48. Furthermore, the Supreme Court has final authority to make determinations as a matter of law and to examine the issues and statements or conduct in its determination. Since one of the questions dealt with political campaigns, this Court conducted a balancing test. Although there was no demonstration that Myers' questionnaire interfered with her ability to perform her duties, the Court did not require the employer to actually prove disruption of the office or destruction of working relationships before taking employment disciplinary action. The Supreme Court struck the balance in favor of the government when it determined the survey was characterized as an employee grievance. "The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154.

The Supreme Court applied the *Pickering/Connick* test in determining whether a public employee's private comment made in response to an attempted assassination of President Reagan, was protected speech. *Rankin v.*

*McPherson*,483 U.S. 378, 381 (1987). In that case, McPherson had made the remark "[S]hoot, if they go for him again, I hope they get him." in private to a coworker and was overheard and reported by another coworker. The Court, in balancing the interests of the employee and the state's interest in the efficient functioning of the workplace, held McPherson's role as a data entry clerk for a constable's office did not warrant a balance in favor of the governmental employer. Although there was argument that McPherson worked in law enforcement, the Court determined she was not a peace officer and that the basic function of the constable's office was service of process. In essence, the Supreme Court determined there was no serious potential for office disruption.

Cross-petitioner contends the Court of Appeals for the Tenth Circuit properly determined it could, as a matter of law, conduct a First Amendment inquiry although the trial court had instructed the jury to make certain First Amendment determinations. However, as in *Connick*, the Tenth Circuit erred by misapplying the *Pickering/Connick* test when it determined Melton's conduct was protected by the First Amendment as being a matter of public concern and tipped the balancing inquiry in favor of the public employee, a police officer charged with law enforcement functions. The fatal error of the Tenth Circuit was the finding:

> Although we recognize the *potential* impact that a breach of confidentiality may have on the department, we must point out that the government *must introduce evidence of an actual disruption* of its services resulting from the speech at issue. *See Rankin*, 107 S.Ct. at 2899; *Pickering*, 391 U.S. at 570-71. While the confidentiality claim may, under other circumstances, tip the balance

> in favor of the government, here the City failed to make its case.

Petitioner's Appendix at 67. (some emphasis added). (footnote omitted)

> Moreover, we are unpersuaded that the City's fundamental assumption – that any communication between law enforcement officials is by its very nature confidential – is correct . . . . We view the communication between Mr. Melton and the prosecutor . . . as one arising *outside* the scope of departmental confidentiality.

*Id.* at 67-68 (emphasis in original).

The majority in the *Melton* panel held "Mr. Melton's interest in this speech outweighs the City's interest in *intradepartmental* relations". *Id.* at 68 (emphasis in original). They noted the dissent's assertions that the court was creating a new burden for the public employer to introduce evidence of actual disruption.

Cross-petitioner contends Melton's speech was not a matter of public concern. Alternatively, if it was a matter of public concern, the potential for disruption both in the police department and in dealings with other law enforcement entities, including state and federal prosecutors, is great if this holding is affirmed. Police officers have been treated by the courts as being para-military and the nature of the business justifies an evaluation of the special character of the organization and an absolute need for secrecy in the officer's communications with a prosecutor. *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 880 (1984).

There is an immediate need for this Honorable Court to grant cross-petitioner's petition for writ of certiorari due to this misapplication of a Supreme Court decision

which will impair confidential relationships of law enforcement agencies with a broad sweep. The decision of the Tenth Circuit was as a matter of law clearly erroneous and should be reversed with judgment entered for The City. As testified by Constable Rankin and noted in the dissent, such a ruling, if upheld, would allow Melton to "ride with the cops and cheer for the robbers." *Rankin v. McPherson*, 483 U.S. at 394.

## II.

## THE TENTH CIRCUIT COURT OF APPEALS DECIDED A FEDERAL QUESTION ON BURDEN OF PROOF IN FIRST AMENDMENT PUBLIC EMPLOYEE SPEECH WHICH WAS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The Tenth Circuit Court of Appeals in *Melton* imposed a new burden on a public employer of introducing evidence of actual disruption of the office activities before determining a public employer's interest was greater than the public employee in conducting the *Connick/Pickering* balancing test.

In footnote 11 of the *Melton* panel opinion, the Court acknowledged the conflict of this burden requirement with other circuits. *Melton*, Petitioner's Appendix at 67, citing *Matherne v. Wilson*, 851 F.2d 752, 761 n. 53 (5th Cir. 1988); and *Jurgensen v. Fairfax County*, 745 F.2d 868, 879 (4th Cir. 1984), which allow a reasonable belief that disruption will occur as satisfying this requirement in some circumstances.

Therefore, since the Tenth Circuit Court of Appeals has decided this federal question which is in direct conflict with other circuits, this Court should grant certiorari to this cross-petitioner.

## III.

## TENTH CIRCUIT'S DECISION IN DETERMINING MELTON HAD A SEPARATE PROPERTY INTEREST AS A RETIRED POLICE OFFICER PURSUANT TO OKLA. STAT. TIT. 11, § 50-125 WAS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT.

The trial court submitted Instruction No. 6 entitled Due Process-Property Interest to the jury to determine if Melton had been denied procedural due process in his continued employment as a police officer. (Cross-Petitioners' Appendix at 6-7) The prefatory statements contained in this instruction stated, in part:

> You are further instructed that, under the laws of the State of Oklahoma, retired police officers *may retain* their status as peace officers of the State of Oklahoma, retired. An officer who retains such status may retain the right to keep and bear firearms *when approved* by the officials of the municipality of retirement.

*Id.* at 6 (emphasis added).

A jury verdict was rendered against The City of Oklahoma City on this property interest claim in the amount of $140,000. The City appealed the verdict as to any determination of a property interest of Melton in employment, and in summary the following issues were addressed:

(1) The City Charter and Oklahoma law refutes the existence of plaintiff's interest in continued employment and the trial court erred in the instructions on this issue;

(2) Alternatively, the procedures provided by The City of Oklahoma City satisfied procedural due process.

The majority opinion in *Melton I* held plaintiff had two separate property interests: (1) As a lieutenant in the Oklahoma City Police Department; (2) as a retired police officer.

The Tenth Circuit noted, however, the due process instruction resulted in a general verdict on the combined procedural due process issues. The panel ruled the trial court had committed error in not directing a verdict for defendants on the continued employment issue "because the undisputed facts concerning notice and hearing clearly indicate that adequate process was given". Petitioner's Appendix at 76.

Although the trial court used a general verdict form, the majority further held:

> Normally, we should remand for a new trial on the issue whether Mr. Melton was deprived of his property interest in retirement status without due process of law. We find it unnecessary to remand on this issue, however, because we find that the evidence developed in the record establishes as a matter of law that Mr. Melton received no process before he was deprived of his property interest in his status as a retired police officer. Oklahoma law authorizes retired police officers to retain their status as "peace officers". Okla. Stat. tit. 11, § 50-125 (West 1978). Additionally, the City's Police Department Operations Manual permits retiring officers with twenty years of service to retain their police badges. Operations Manual § 5.05. These provisions clearly created a property interest in Mr. Melton with respect to his status as a retired officer and in the benefits which accrue therefrom.

*Id.* at 77.

> In sum, with respect to defendants' liability on Mr. Melton's deprivation of property claims, the trial court shall direct a verdict for defendants on the continued employment claim and direct a verdict for plaintiff on the retirement status claim. However, plaintiff's verdict shall be entered *solely against Chief Gramling*. We remand for a new trial on two issues: (1) the damages to be assessed against Chief Gramling, and (2) the liability of the City for Chief Gramling's actions. The trial court must determine as a matter of law if Chief Gramling acted as a "final policymaker" or if his actions were ratified by a "final policymaker" before it submits the question of damages against the City to the jury. See *City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988), *and* discussion *infra*.

*Id.* at 78-79 (some emphasis supplied).

In footnote 18, the majority further stated that The City did not challenge the trial court's finding of Melton's property right as a retired police officer and, therefore, they did not review this finding. Petitioner's Appendix at 76. Further, in footnote 19, the majority stated: "The trial court not only erred in combining the two deprivation of property issues under one jury instruction but also erred by failing to limit its application to Chief Gramling and the City in the retirement status determination." *Id.* at 78.

As to the other individual cross-petitioners, the property interest claim was dismissed by the Tenth Circuit.

Although Instruction No. 3 included a contention of the plaintiff that he had a property interest in his retirement status, a separate jury instruction regarding retirement status was never given. The City contends the general verdict on due process property interest claim

allowed recovery for an alleged deprivation of a protected property interest in continued employment only. Instruction No. 6, however, was so confusing the jury could have awarded Melton damages on either continued employment or retirement status.

The assertion by the Tenth Circuit that Oklahoma law "authorizes" a police officer to retain the status of peace officer refers to Okla. Stat. tit. 11, § 50-125. Section 50-125 states that a retired police officer "may retain" the status of peace officer. Although there is no Oklahoma case specifically addressing the use of "may" as it appears in Okla. Stat. tit. 11 § 50-125, there is case law interpreting other statutory use of the term "may" which establishes that the use of "may" expresses a discretionary not mandatory legislative intent.

The Tenth Circuit did not examine § 50-125 in light of the intent of the legislature to create a right or to allow a privilege. It simply glossed over the presumption of discretion implicit in the use of "may" by ignoring the language selected by the Oklahoma legislature.

> This Court will not discuss the myriad number of cases . . . discussing the semantic connotation placed on the use of the words "shall" and "may", other than to state that the word "shall" is generally construed as being mandatory or directive and the word "may" as permissive or discretionary.

*Mason v. National Flood Insurers Association*, 431 F. Supp. 1021, 1022-23 (N.D. Okla. 1977).

Nevertheless, such a provision could not under any interpretation confer a property right to Melton on his retirement status. Therefore, the Due Process Clause of

the Fourteenth Amendment of the U. S. Constitution cannot be invoked as there is no property right.

In order to have a constitutionally protected property interest, one must be able to demonstrate a legitimate claim of entitlement to the interest. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Supreme Court stated:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

*Id.* at 577.

Thus, whether Melton had a property interest in his government employment or retirement depends upon whether one was created under Oklahoma law. *Bishop v. Wood*, 426 U.S. 341, 344 (1976).

The majority in *Melton* took judicial notice of The City as a Charter city for purposes of determining "that the City Manager is the 'final policymaking authority' over employment decisions affecting City personnel" and determining a municipal liability under *Praprotnik* analysis.[7] Petitioner's Appendix at 90 citing, *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). *See also: Graham v. The*

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[7] Footnote 34 recited pertinent portions of The City Charter which provided for dismissal "solely for the good of the service". Petitioner's Appendix at 99. The Tenth Circuit did not take judicial notice of the Charter for its determination as to whether Melton had a property interest in continued employment.

*City of Oklahoma City*, 859 F.2d 142, 146 (10th Cir. 1988); (police officer for Oklahoma City has no property interest in employment).

Judge Baldock in his dissent stated:

> Contrary to the court's dubious construction, the plain language of § 50-125 indicates that whether retired officers "may retain" their status as peace officers and their right to possess firearms is entirely within the discretion of their superiors. Additionally, neither the court nor Melton point to any rule or regulation which entitles him to wear his police uniform in security-type employment. Consequently, under Oklahoma law, Melton has no legitimate claim of entitlement to, and *a fortiori* no property interest in, any status as a retired police officer.

Petitioner's Appendix at 130-31.

Neither the Charter nor any statute or policy contains any language which would entitle Melton to a property interest in his retirement status. Since Melton had no property interest in his retirement status, no constitutional due process hearing would be required. It was "plain error" for the Tenth Circuit to sever Instruction No. 6, and cross-petitioner requests this Honorable Court to grant certiorari, reverse the decision of the appellate court which remanded the matter to the trial court to determine damages as to Gramling and municipal liability. *Zant v. Stephens*, 462 U.S. 862, 881 (1983). Furthermore, the decision of the Tenth Circuit finding a property interest in retirement status was in direct conflict with *Board of Regents v. Roth* and *Bishop v. Wood*. (Although there is no present finding of municipal liability on this issue, cross-petitioner raises this matter as grounds for certiorari to preserve this issue.)

## IV.

## THE TENTH CIRCUIT'S FINDING THAT MELTON HAD A PROPERTY INTEREST IN CONTINUED EMPLOYMENT WAS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT.

Although the Tenth Circuit ruled in favor of The City on the issue of whether The City had satisfied the procedural due process requirements of the Fourteenth Amendment in its termination of Melton, The City wishes to reserve this issue in the event respondent's petition for certiorari is granted. In this regard, The City incorporates the arguments contained in Proposition III.[8]

## CONCLUSION

Defendant City of Oklahoma City prays this Court, upon consideration of the argument above, to grant it certiorari for review of the important issues raised herein.

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[8] *See also* Okla. Stat. tit. 11, § 13-108 (West 1978). (Statute which authorizes courts to judicially notice charters).